Supreme Court, U.S.
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80-969

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO.

GEORGE FIRESTONE, as Secretary of State of Florida, DOROTHY GLISSEN, as Director of Division of Elections, State of Florida, and ROBERT HART, Chairman of Florida Elections Commission, ANNE KELLY, ROBERT HUCKSHORN, SAMUEL SHORESTIN and FLORENCE NEIDIG, Members of Florida Elections Commission.

Petitioners,

vs.

DADE VOTERS FOR A FREE CHOICE, a Political Committee and THE FLORIDA RESTAURANT ASSOCIATION, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

ANTHONY C. MUSTO
Assistant Attorney General
Chief Counsel,
Miami Division
401 N. W. 2nd Avenue (820)
Miami, Florida 33128
(305) 377-5441

JIM SMITH
Attorney
General, State
of Florida
Tallahassee,
Florida

QUESTIONS PRESENTED

I

WHETHER THE DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT (A) CONFLICTS WITH THE OPINION OF THE SUPREME COURT OF CALIFORNIA IN CITIZENS AGAINST RENT CONTROL V. CITY OF BERKELEY, 167 Cal.Rptr. 84 (1980), IN THAT THE TWO CASES REACH OPPOSITE CONCLUSIONS ON THE QUESTION OF WHETHER IT IS CONSTITUTIONALLY VALID UNDER THE FIRST AMENDMENT TO RESTRICT THE AMOUNT OF CONTRIBUTIONS TO POLITICAL COMMITTEES IN THE CONTEXT OF REFERENDUM ELECTIONS, AND; (B) DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, IN THAT THE QUESTION SET FORTH ABOVE, PRESENTED BY THIS CASE, IS AN ISSUE WHICH HAS BEEN LEFT OPEN BY THIS COURT, WHICH IS OF SIGNIFICANT IMPORTANCE AND WHICH HAS WIDESPREAD RAMIFICATIONS?

QUESTIONS PRESENTED CONTINUED

II

WHETHER THE DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION IN THAT IT SANCTIONS THE ISSUANCE OF AN INJUNCTION AGAINST THE ENFORCEMENT OF A STATE CRIMINAL STATUTE IN A SITUATION IN WHICH THE STATE OFFICIAL WITH THE SOLE AUTHORITY TO BRING CRIMINAL CHARGES WAS NOT MADE A PARTY TO THE PROCEEDING, THEREBY MAKING IT IMPOSSIBLE TO DETERMINE WHETHER A STATE PROSECUTION WAS LIKELY, OR EVEN REMOTELY POSSIBLE, AND IN WHICH THERE IS NO SHOWING AT ALL OF ANY GENUINE THREAT OF ENFORCEMENT OF THE STATUTE?

PARTIES TO PROCEEDING

All parties to this proceeeding are contained in the caption of the case.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	1-2
PARTIES TO PROCEEDING.....	3
OPINIONS BELOW.....	4
GROUNDS ON WHICH JURISDICTION IS INVOKED.....	5
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	6-7
STATEMENT OF THE CASE.....	8-9
BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.....	10
ARGUMENT.....	11-22
CONCLUSION.....	23
CERTIFICATE OF SERVICE.....	24

TABLE OF CITATIONS

CASES	PAGE
Babbitt v. United States, 442 U.S. 289 (1979).....	19
Buckley v. Valeo, 424 U.S. 1 (1976).....	15, 16
Citizens Against Rent Control v. City of Berkeley, 99 Cal.Rptr. 448 (Ct.App. 1st Dist. 1979).....	14
Citizens Against Rent Control v. City of Berkeley, 167 Cal.Rptr. 84 (Cal. 1980).....	11, 12, 13, 14
Dade Voters for a Free Choice v. Firestone, 621 F.2d 195 (5th Cir. 1980).....	4
DiBona v. State, 121 So.2d 192 (Fla. 2d DCA 1960).....	18
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).....	15, 16
St. Martin's Press, Inc. v. Carey, 605 F.2d 41 (2d Cir (1979).....	19

TABLE OF CITATIONS
CONTINUED

CASES PAGE

State ex rel. Hardy v. Blaunt, 261 So.2d 172 (Fla. (1972)..... 18

State v. Mack, 187 So.2d 918 (Fla. 2d DCA 1966)..... 18

Steffel v. Thompson, 415 U.S. 452 (1974)..... 21, 22

United Public Workers of America (C.I.O.P v. Mitchell, 330 U.S. 75 (1947)..... 21

Younger v. Harris, 401 U.S. 37 (1971)..... 19, 20

RULES

Supreme Court Rule 17.1..... 12, 22

OTHER AUTHORITIES

First Amendment, United States Constitution..... 6

28 U.S.C. § 1254..... 5, 9

28 U.S.C. & 1331..... 10

28 U.S.C. & 1342..... 10

TABLE OF CITATIONS
CONTINUED

OTHER AUTHORITIES	PAGE
42 U.S.C. § 1983.....	10
FLORIDA STATUTES	
Florida Statutes § 106.08.....	6, 7, 12

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Florida in this cause is unreported. The opinion of United States Court of Appeals, Fifth Circuit, is reported as Dade Voters for a Free Choice v. Firestone, 621 F.2d 195 (5th Cir. 1980). The opinion deals both with this case and a consolidated case, Let's Help Florida v. McCrary, which, as reported, is the lead case.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, entered July 11, 1980. (A. 1-21). A timely petition for rehearing was denied on September 10, 1980. (A. 60-61).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. Florida Statutes § 106.08(1).

> 106.08 Contributions; limitations on.--
>
> (1) No person or political committee shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:
>
> (a) To a candidate for countywide office or to a candidate in any election conducted on less than a countywide basis, $1,000.
>
> (b) To a candidate for legislative or multicounty office, $1,000.
>
> (c) To a candidate for statewide office, $3,000.

(d) To any political committee in support of, or in opposition to, an issue to be voted on in a statewide election, $3,000.

(e) To any political committee in support of, or in opposition to, an issue to be voted on in a countywide, districtwide, or less than countywide election, $1,000.

(f) To a political committee supporting or opposing one or more candidates, $1,000.

(g) To a candidate for county court judge or circuit judge, $1,000.

(h) To a candidate for retention as a judge of a District Court of Appeal, $2,000.

(i) To a candidate for retention as a justice of the Supreme Court, $3,000.

STATEMENT OF THE CASE

Plaintiffs instituted a proceeding in the United States District Court for the Northern District of Florida seeking an injunction against the enforcement of a Florida statute restricting the amount of money a person, natural or corporate, or political committee may contribute to a political committee in support of or in opposition to an issue being voted upon in a referendum election. The statute provides that its violation shall constitute a criminal offense. Nonetheless, Plaintiffs did not make the State Attorney, the only person in Florida with the authority to bring criminal charges, a party to the suit.

The district court granted relief and Defendants appealed. The case was consolidated with an appeal in the case of Let's Help Florida v. McCrary. The United States Court of Appeals, Fifth Circuit, affirmed, holding that (a) a case or controversy did exist and federal abstention was inappropriate since

Defendants did not disavow enforcement of the statute (The court did not address the fact that the State Attorney was not made a party to the suit), and (b) the statute was unconstitutional as an impermissible abrigement of First Amendment rights.

The present proceeding follows. Defendants are also seeking review of the same decision presented here in an appeal taken in the consolidated case of Let's Help Florida v. McCrary. Certiorari is being utilized in the present case because of the existence of a second issue not presented by Let's Help Florida v. McCrary, which could not be raised if this case had proceeded by appeal. 28 U.S.C. § 1254(2).

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

For the reasons set forth in the argument portion of this brief, it is Defendants' position that there was no jurisdiction for consideration by the court of first instance in this cause. Jurisdiction was asserted by Plaintiffs, however, under 28 U.S.C. § 1331, 1342 and 42 U.S.C. § 1983.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE UNITED STATES, FIFTH CIRCUIT (A) DOES CONFLICT WITH THE OPINION OF THE SUPREME COURT OF CALIFORNIA IN CITIZENS AGAINST RENT CONTROL V. CITY OF BERKELEY, 167 Cal.Rptr. 84 (Cal. 1980), IN THAT THE TWO CASES REACH OPPOSITE CONCLUSIONS ON THE QUESTION OF WHETHER IT IS CONSTITUTIONALLY VALID UNDER THE FIRST AMENDMENT TO RESTRICT THE AMOUNT OF CONTRIBUTIONS TO POLITICAL COMMITTEES IN THE CONTEXT OF REFERENDUM ELECTIONS, AND; (B) DID DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, IN THAT THE QUESTION SET FORTH ABOVE, PRESENTED BY THIS CASE, IS AN ISSUE WHICH HAS BEEN LEFT OPEN BY THIS COURT, WHICH IS OF SIGNIFICANT IMPORTANCE AND WHICH HAS WIDESPREAD RAMIFICATIONS.

The decision of the United States Court of Appeals, Fifth Circuit, is in clear and direct conflict with the decision of the Supreme Court of California in Citizens Against Rent Control v. City of Berkeley, 167 Cal.Rptr. 84 (Cal. 1980), thus forming a basis for the

invocation of this Court's jurisdiction. United States Supreme Court Rule 17.1(a) lists as a basis for the possible grant of review by certiorari, "[w]hen a federal court of appeals has . . . decided a federal question in a way in conflict with a state court of last resort. . . ." In addition, a basis for jurisdiction exists because the appellate court here "has decided an important question of federal law which has not been, but should be, settled by this Court . . ." United States Supreme Court Rule 17.1(c).

In the present case, the Fifth Circuit found unconstitutional Florida Statutes §§ 106.08(1)(d) and 106.08(1)(e) which impose limitations on the amount of money that any person, natural or corporate, or political committee may contribute to a political committee in support of or in opposition to an issue being voted upon in a referendum election. The court held that the statutory provisions in question "abridge important first amendment rights and are ill-suited for preventing corruption or for promoting disclosure." 621 F.2d at 201. (A. 21).

In Citizens Against Rent Control v. City of Berkeley, supra, the California Supreme Court dealt with a city ordinance which imposed the same manner of limitation on contributions as did the Florida statutes dealt with in the present case. The court found the ordinance to be valid, stating:

> We hold above that large contributions to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures; in light of this conclusion, restricting the size of such contributions "focuses precisely on the problem." (Buckley [v. Valeo], 424 U.S. [1] at p. 28, 96 S.Ct. at p. 639 [1976].) We reject, as the Buckley court did, the argument that mere disclosure of contributions is sufficient for this purpose. (Id. at pp. 27-28, 96 S.Ct. at pp. 638-39.) As with the measure at issue in Buckley, the contribution limitation in section 602 does not interfere with other ways of engaging in political activity, but restricts the one means that represents a danger rather than an aid to the electoral process.
>
> 167 Cal.Rptr. at 91.

There can really be little dispute that the two opinions conflict. Indeed, the dissent in Citizens Against Rent Control specifically noted that the opinion in the present case conflicted with the court's holding in Citizens Against Rent Control. 167 Cal.Rptr. at 94-95. Moreover, one of the cases relied upon in the decision presently under review was the lower appellate court opinion, Citizens Against Rent Control v. City of Berkeley, 99 Cal.Rptr. 448 (Ct.App. 1st Dist. 1979), reversed by the California Supreme Court in Citizens Against Rent Control. 621 F.2d at 200. (A. 17).[1]

Given the conflict, Defendants submit that this Court should grant jurisdiction. Clearly, the issue presented

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[1]Review has been sought in this Court of the decision in Citizens Against Rent Control. The appellants therein have asserted conflict with the opinion in the present case. Citizens Against Rent Control v. City of Berkeley, case no. 80-737, Appellants' jurisdictional statement, pp. 20-21.

is one that will be presented by statutes and ordinances throughout the nation. Allowing this conflict to remain unresolved will only perpetuate confusion in this area of the law.

Further, the import of the issue is readily apparent, as is the fact that it is an issue which should logically be considered at this time, as a natural matter to be decided subsequent to this Court's decisions in Buckley v. Valeo, 424 U.S. 1 (1976) and First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

In Buckley, this Court struck down limitations on expenditures, but sanctioned limitations on contributions, in the context of candidate elections. Then, in Bellotti, this Court declared unconstitutional a Massachusetts statute which prohibited coporations from making expenditures for the purpose of influencing the vote on questions submitted to the voters. This Court, however, left open the question of the constitutionality of

laws prohibiting or limiting contributions to political committees, the very question presented here. 435 U.S. at 787, n. 26. It thus appears that the issue presented here is a logical outgrowth of Buckley and Bellotti which needs to be dealt with by this Court.

Based, therefore, upon the fact that a logical progression of issues calls for review, the fact that clear conflict exists and the import and widespread ramifications of the issue, Defendants submit that this Court should grant certiorari jurisdiction in this cause.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION IN THAT IT SANCTIONS THE ISSUANCE OF AN INJUNCTION AGAINST THE ENFORCEMENT OF A STATE CRIMINAL STATUTE IN A SITUATION IN WHICH THE STATE OFFICIAL WITH THE SOLE AUTHORITY TO BRING CRIMINAL CHARGES WAS NOT MADE A PARTY TO THE PROCEEDING, THEREBY MAKING IT IMPOSSIBLE TO DETERMINE WHETHER A STATE PROSECUTION WAS LIKELY, OR EVEN REMOTELY POSSIBLE, AND IN WHICH THERE IS NO SHOWING AT ALL OF ANY GENUINE THREAT OF ENFORCEMENT OF THE STATUTE.

In rejecting contentions regarding the lack of federal jurisdiction due to the lack of case or controversy and the appropriateness of the federal abstention doctrine, the appellate court relied primarily upon the fact that the state official defendants in this case have not disavowed any intention of enforcing the challenged statute and that the plaintiffs' fear of prosecution is therefore not imaginary or wholly speculative.

621 F.2d at 198. (A. 9). In reaching this conclusion, the court's reasoning conflicts with a number of opinions of this Court regarding federal jurisdiction, primarily because none of the Defendants have the authority under Florida law to prosecute the plaintiffs, or anyone else for that matter.

Under Florida law, the decision as to what criminal charges are to be brought is one made solely by the State Attorney, the prosecuting authority for the State. State ex rel. Hardy v. Blaunt, 261 So.2d 172 (Fla. 1972); State v. Mack, 187 So.2d 918 (Fla. 2d DCA 1966); DiBona v. State, 121 So.2d 192 (Fla. 2d DCA 1960). In the present case, the State Attorney was not made a party to the proceeding.

Thus, there is simply no way of knowing what the State's intentions would have been regarding prosecution. The State Attorney may very well have disavowed any intent to prosecute, as did, for instance, the prosecutors in

St. Martin's Press, Inc. v. Carey, 605 F.2d 41 (2d Cir. 1979), where such action was held to preclude federal intervention. Under the facts here, therefore, the lack of a specific disavowel of the intent to prosecute, the appellate court's primary reason for rejecting the defendants' position and a major factor relied upon by this Court in reaching a similar conclusion in Babbitt v. United States, 442 U.S. 289 (1979), is not a proper factor to consider. Plaintiffs' failure to make the State Attorney a party precluded the possibility of any such statement being made. Given this fact, a conclusion that prosecution would have been likely, or even reasonably foreseeable, can only be said to be speculation.

The situation is thus similar to that dealt with in Younger v. Harris, 401 U.S. 37 (1971), not as regards the most well known aspects of Younger, the requirement that federal courts not interfere in ongoing state criminal prosecutions, but as regards the disposition of Younger relevant to the three plaintiffs other than Harris against whom no criminal charges were pending.

Whatever right Harris, who is being prosecuted under the state syndicalism law may have, Dan, Hirsch, and Broslavsky cannot share it with him. If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true--either on the admission of the State's district attorney or on any other evidence--then a genuine controversy might be said to exist. But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited." We do not think this allegation even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases. See Golden v. Zwickler, 394 U. S. 103 (1969).

401 U.S. at 42.

See also United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 at 89-90 (1947).

These sentiments apply equally here. There exists no case or controversy and the appellate court's decision therefore conflicts with the above decisions of this Court.

For the same reasons, the federal abstention doctrine applies here. The appellate court cited Steffel v. Thompson, 415 U.S. 452 (1974), for the proposition that the abstention principles of Younger are inapplicable when no state prosecution is pending. 621 F.2d at 199. (A. 11). While it is true that Steffel allows for review under certain circumstances, it is important to realize that these circumstances require the demonstration of "a genuine threat of enforcement." 415 U.S. at 475. Here, since, as previously detailed, there is no way of knowing what position would be taken by the only person with the authority to bring criminal charges, this requirement cannot be said to have

been met. The appellate court's opinion therefore is in conflict with this Court's opinion in Steffel.

In essence, the decision here has done away with the federal abstention doctrine in all but situations in which a state prosecution is pending. Such a significant departure from the standard established by this Court that there exist a genuine threat of enforcement of a challenged state statute is a matter which is of such import as to warrant this Court's review. Moreover, this departure conflicts with the numerous cases cited herein regarding both case and controversy and premature intervention. Jurisdiction should therefore be granted. United States Supreme Court Rules 17.1(a) and (c).

CONCLUSION

Based upon the foregoing argument, Petitioners submit that this Court should grant a writ of certiorari in this cause.

Respectfully submitted,

JIM SMITH
Attorney General
State of Florida
Tallahassee, Florida

ANTHONY C. MUSTO
Assistant Attorney General
Chief Counsel, Miami Division
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
Florida Regional Service
Center (Suite 820)
401 N. W. 2nd Avenue
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition was served upon TALBOT D'ALEMBERTE & DONALD M. MIDDLEBROOKS, Steel, Hector & Davis, 1414 Southeast First National Bank Building, Miami, Florida, 33131, and STEVEN J. UHFELDER, Ausley, McMullen, McGehee, Carothers & Proctor, Post Office Box 391, Tallahassee, Florida, 32302, this ___ day of December, 1980.

ANTHONY C. MUSTO
Assistant Attorney General
Chief Counsel, Miami Division